IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs June 20, 2006

# JOHN DARRYL WILLIAMS-BEY v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Davidson County**
**No. 2001-A-349 Cheryl Blackburn, Judge**

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**No. M2005-00709-CCA-R3-PC - Filed August 4, 2006**

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The petitioner, John Darryl Williams-Bey, was convicted of carjacking by a jury in the Davidson County Criminal Court, and he received a sentence of eighteen years in the Tennessee Department of Correction. Subsequently, he filed a petition for post-conviction relief, alleging that his trial counsel were ineffective. The post-conviction court denied the petition, and the petitioner now appeals. Upon review of the record and the parties' briefs, we affirm the judgment of the post-conviction court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court is Affirmed.**

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which DAVID G. HAYES and THOMAS T. WOODALL, JJ., joined.

Nathan S. Moore, Nashville, Tennessee, for the appellant, John Darryl Williams-Bey.

Paul G. Summers, Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; Victor S. Johnson, III, District Attorney General; and Roger Moore, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

### I. Factual Background

Following the petitioner's conviction for carjacking, a Class B felony, the petitioner appealed his conviction and twenty-year sentence to this court. See State v. Johnny Darryl Williams-Bey, No. M2002-00950-CCA-R3-CD, 2003 WL 21997741, at *1 (Tenn. Crim. App. at Nashville, Aug. 21, 2003). On appeal, this court affirmed the petitioner's conviction but reduced his sentence to eighteen years. Id. We summarized the proof adduced at trial as follows:

On the afternoon of January 15, 2001, Marilyn Mund went to the Officemax store on Nolensville Road in Nashville. She left the store at approximately 1:00 p.m. She walked to her car, a 1996 Acura, which was parked in the far corner of the parking lot. Ms. Mund unlocked her car, and when she reached across the seat to put her items in the car, she "felt this pair of hands on [her] shoulders." She turned around, and the man who had grabbed her shoulders pushed her onto the seat of the car. Ms. Mund testified that the man "got on top of me because he wanted to get my keys." Ms. Mund began to scream, but no one was able to see or hear her because a van was parked between her and the storefront. Eventually, the man wrestled Ms. Mund's keys from her. He said to her, "If you cooperate I won't hurt you." At that point, the man got Ms. Mund out of the car, and he got in the driver's seat. He had some difficulty starting the car, and Ms. Mund opened the car door to get her purse. The man then got out of the car and pushed Ms. Mund down onto the pavement. He got back in, started the car, and "sped away right down Nolensville Road."

Ms. Mund went back to Officemax, where she found a person with a cellular phone who called the police. Police officers arrived shortly thereafter, and Ms. Mund gave them a description of her assailant. Doctors subsequently determined that Ms. Mund suffered a cracked pelvis and a broken rib during the attack. The next day, Detective Warren of the Nashville Police Department went to Ms. Mund's house to show her a photographic lineup. From the lineup, she identified the [petitioner] as the man who took her car. Based upon this identification, Detective Warren obtained an arrest warrant charging the [petitioner] with carjacking.

Officer Mark Anderson testified that he came into contact with the [petitioner] during the early morning hours of January 16, 2001. The [petitioner] had been stopped by another officer, and Officer Anderson arrived shortly thereafter. The [petitioner] was driving a mid-1980s Buick, and he was unable to produce a driver's license. Officer Anderson began to search the vehicle because it was going to have to be towed. In the back seat of the car he found a white plastic bag from Officemax and Ms. Mund's black purse. Another officer later located Ms. Mund's car in an apartment complex parking lot not far from where the [petitioner] was stopped.

The [petitioner] called as a witness Kimberly Buckner, who worked at the Tennessee Department of Safety. She testified that the

> license plate bearing number APS-059, which was on the car the [petitioner] was driving when he was stopped by the police, was registered to an Eric D. Jamison. The plate was assigned to a blue 1984 Oldsmobile Cutlass, not a white 1987 Oldsmobile Cutlass.

Id. at **1-2. This court noted that there was a conflict in the proof regarding the vehicle the petitioner was driving when he was pulled over by police; the vehicle possibly being a white, 1987 Oldsmobile Cutlass or a blue, 1984 Oldsmobile Cutlass. Id. at *2 n.1. Regardless, the license plate of the vehicle the petitioner was driving when he was arrested did not match the vehicle to which the plate was registered. Id.

Subsequently, the petitioner filed a petition for post-conviction relief, alleging multiple claims of ineffective assistance of counsel. The petitioner complained that his attorneys failed to pursue fingerprint evidence from the vehicle stolen from the victim and failed to seek a curative instruction to explain the lack of fingerprint evidence. Additionally, the petitioner contended that his attorneys failed to pursue alternate defenses, such as alibi or a third-party defense.

At the post-conviction hearing, the first attorney (lead counsel) testified that he had been appointed to the petitioner's case. Thereafter, a second attorney (co-counsel) joined the defense and acted as second chair. The attorneys met with the petitioner on numerous occasions, with each meeting lasting from ten minutes to over an hour. The attorneys discussed the State's evidence with the petitioner and reviewed potential trial strategy.

Lead counsel recalled that when the petitioner was arrested, he was driving an Oldsmobile, which had also been stolen. Additionally, some of the victim's belongings were found in the backseat of the Oldsmobile. Lead counsel explained,

> One thing that was kind of a strategy decision on our part was that we did not want the jury to hear that [the petitioner] had been pulled over in a different stolen car and [the State] had agreed not to raise that issue if we were not going to challenge the stop or something like that, and we had had a suppression hearing on the stop.

Lead counsel believed the jury would not look favorably upon the petitioner after learning that he was connected to a second stolen car. Lead counsel acknowledged that such a course of action did not allow the defense to inform the jury that the petitioner had obtained the stolen Oldsmobile from Eric Jamison. The petitioner maintained that Jamison could have been or at least led to an alternate suspect in the victim's carjacking. Approximately one month after lead counsel learned of Jamison's connection to the petitioner, Jamison died.

Lead counsel recalled that the victim's Acura was found a "couple hundred yards" from the petitioner's apartment complex. Shortly after the Acura was found, police returned it to the victim.

Lead counsel stated that police did not perform fingerprint testing on the Acura before it was returned to the victim. He did not know what the results of the testing would have been or if fingerprints could have been found on the Acura. He said that police typically only perform fingerprint testing on a vehicle if the crime involved a homicide or very serious crime because the testing could damage the vehicle and cleaning the testing residue from the vehicle was expensive.

Counsel did not have independent fingerprint testing performed. Lead counsel stated that fingerprinting could have been helpful to the defense if the petitioner's fingerprints were not found in the Acura and someone else's fingerprints had been present. However, he opined that the defense would still have had to overcome the fact that the victim's belongings were found in the Oldsmobile in which the petitioner was arrested. Moreover, the defense would have to contend with the victim's strong identification of the petitioner as her assailant. Lead counsel admitted that it never occurred to him to request a curative instruction regarding the lack of fingerprint testing.

Lead counsel recalled that the petitioner did not testify at trial because the State had given notice that he would be impeached with his "very significant criminal record." However, the petitioner made a proffer of his prospective testimony. Lead counsel stated that the petitioner told him that he was working through Labor Ready temporary service at the time of the offense. He maintained that the defense had no difficulty obtaining discovery from the State, and there were no "surprises" in the proof adduced at trial. Regardless, lead counsel opined that the case was difficult to defend because the State's proof was "really clean" and difficult to refute.

Co-counsel testified at the post-conviction hearing that he was very involved in the preparation of the petitioner's case, and he had several meetings with the petitioner. Co-counsel recalled that the victim was the primary witness against the petitioner.

Co-counsel stated that police had not attempted to fingerprint the victim's Acura before returning it to her nor did the defense attempt to have independent testing performed after the victim had control of the vehicle. He believed that once the Acura was back in the victim's possession, no fingerprints would have been found in the vehicle.

Co-counsel acknowledged that he was familiar with State v. Ferguson, a Tennessee Supreme Court case involving the loss or destruction of evidence by the State. He "guess[ed]" that police returning the Acura to the victim could be tantamount to losing or destroying evidence. Nevertheless, co-counsel never thought about requesting a curative instruction concerning the destruction of evidence. Co-counsel opined that even if testing had been performed and the petitioner's fingerprints had not been found in the Acura, it would not have greatly helped the petitioner's case.

Co-counsel stated that there was no difficulty in obtaining discovery from the State. Additionally, neither attorney had problems discussing the case with the petitioner, and the petitioner voiced no complaints about their representation. Co-counsel admitted, "[W]e were frankly pessimistic given the strength of the identification about [the] potential outcome at trial."

The petitioner was the final witness at the post-conviction hearing. He stated that he filed a post-conviction petition because he believed his attorneys' "legal work was shoddy." He acknowledged that his attorneys spoke with him about the case, but he maintained that the meetings were infrequent and they "agreed and disagreed on numerous ways to go about the form of attacking the case." The petitioner told the attorneys about a potential alibi defense, namely that he was working through Labor Ready at the time of the crime. However, the defense was not pursued. Additionally, the petitioner maintained that he told the attorneys about Jamison and his potential involvement in the crime approximately five months before Jamison's death.

The petitioner stated that he believed his attorneys were "amiss" in their investigation of the case. He stated that he was "between unsatisfied and disappointed" in his discussions with the attorneys. The petitioner wanted his attorneys to do "things like backing up the line of defense as far as fingerprints, the initial stop . . . because I felt like the stop in itself, like, you know, I guess it is part of the fruit of the whole tree, and I felt like the stop really kind of constituted everything that came about because the stop was illegal within itself."

At the conclusion of the hearing, the post-conviction court denied the petition for post-conviction relief. The court found that the petitioner did not meet his burden of establishing the ineffective assistance of counsel by clear and convincing evidence. On appeal, the petitioner challenges this ruling. Specifically, the petitioner maintains that his attorneys were ineffective in failing to pursue a curative instruction regarding the lack of fingerprint evidence and in failing to inform the jury that the petitioner was stopped while driving a second stolen vehicle.

## II. Analysis

To be successful in his claim for post-conviction relief, the petitioner must prove all factual allegations contained in his post-conviction petition by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2003). "'Clear and convincing evidence means evidence in which there is no serious or substantial doubt about the correctness of the conclusions drawn from the evidence.'" State v. Holder, 15 S.W.3d 905, 911 (Tenn. Crim. App. 1999) (quoting Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 n.2 (Tenn. 1992)). Issues regarding the credibility of witnesses, the weight and value to be accorded their testimony, and the factual questions raised by the evidence adduced at trial are to be resolved by the post-conviction court as the trier of fact. See Henley v. State, 960 S.W.2d 572, 579 (Tenn. 1997). Therefore, we afford the post-conviction court's findings of fact the weight of a jury verdict, with such findings being conclusive on appeal absent a showing that the evidence in the record preponderates against those findings. Id. at 578.

A claim of ineffective assistance of counsel is a mixed question of law and fact. See State v. Burns, 6 S.W.3d 453, 461 (Tenn. 1999). We will review the post-conviction court's findings of fact de novo with a presumption that those findings are correct. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001). However, we will review the post-conviction court's conclusions of law purely de novo. Id.

"To establish ineffective assistance of counsel, the petitioner bears the burden of proving both that counsel's performance was deficient and that the deficiency prejudiced the defense." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984)). To establish deficient performance, the petitioner must show that counsel's performance was below "the range of competence demanded of attorneys in criminal cases." Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975). To establish prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068. Moreover,

> [b]ecause a petitioner must establish both prongs of the test, a failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim. Indeed, a court need not address the components in any particular order or even address both if the [petitioner] makes an insufficient showing of one component.

Goad, 938 S.W.2d at 370 (citing Strickland, 466 U.S. at 697, 104 S. Ct. at 2069).

On appeal, the petitioner first claims that counsel were ineffective when they did not seek a curative instruction regarding the lack of fingerprint evidence. The petitioner contends that State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999), supported a request for the curative instruction. In order to provide context for the petitioner's argument, we note that the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 8 of the Tennessee Constitution afford every criminal defendant the right to a fair trial. See Johnson v. State, 38 S.W.3d 52, 55 (Tenn. 2001). Accordingly, the State has a constitutional duty to furnish a defendant with exculpatory evidence pertaining to the petitioner's guilt or innocence or to the potential punishment faced by a defendant. See Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97 (1963).

In Ferguson, 2 S.W.3d at 912, our supreme court addressed the issue of when a defendant is entitled to relief when the State has *lost* or *destroyed* evidence that was alleged to have been exculpatory. The court explained that a reviewing court must first determine whether the State had a duty to preserve the lost or destroyed evidence. Ferguson, 2 S.W.3d at 917. Ordinarily, "the State has a duty to preserve all evidence subject to discovery and inspection under Tenn. R. Crim. P. 16, or other applicable law." Id. However,

> "[w]hatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was

> destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."

Ferguson, 2 S.W.3d at 917 (quoting California v. Trombetta, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 2534 (1984) (footnote and citation omitted)).

If the proof demonstrates the existence of a duty to preserve the evidence and further shows that the State has failed in that duty, a court must proceed with a balancing analysis involving consideration of the following factors:

> 1. The degree of negligence involved;
>
> 2. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and
>
> 3. The sufficiency of the other evidence used at trial to support the conviction.

Id. (footnote omitted). If the court's consideration of these factors reveals that a trial without the missing evidence would lack fundamental fairness, the court may consider several options. For example, the court may dismiss the charges or, alternatively, provide an appropriate jury instruction. Id.

We note that although the petitioner obviously complains regarding counsel's failure to seek a curative instruction regarding the lack of fingerprint evidence, he has failed to clearly state why he would have been entitled to such an instruction. In his brief, the petitioner contends that "[t]rial counsel failed to pursue fingerprint evidence in the case, and upon learning it had been destroyed, did not request a curative instruction for the jury." The petitioner then complains that "the State did not attempt to preserve any fingerprint evidence." The petitioner also bemoans the "failure of fingerprinting" and the fact that "no fingerprint evidence was taken." We are at a loss as to the exact nature of the petitioner's complaint.

Nevertheless, at the post-conviction hearing, the petitioner failed to prove that fingerprint testing of the victim's vehicle would have produced any results. Further, co-counsel testified that even if testing had revealed that the petitioner's fingerprints were not in the victim's vehicle, that result would not have greatly helped the defense. Moreover, the petitioner's attorneys maintained that if the testing results had been favorable, the defense would have had to contend with police finding the victim's stolen belongings in the Oldsmobile the petitioner was driving when he was arrested, as well as the victim's strong identification at trial of the petitioner as the perpetrator. Accordingly, regardless of the specific nature of the petitioner's complaints, he failed to prove by clear and convincing evidence that the "fingerprint evidence" he complains of ever existed. We can find no case law in this state that indicates that Ferguson applies to evidence that never existed. On

the contrary, this court has repeatedly refused to grant Ferguson relief when there was no proof that the alleged evidence existed. See Grenda Ray Harmer v. State, No. E2005-01580-CCA-R3-PC, 2006 WL 1472513, at *8 (Tenn. Crim. App. at Knoxville, May 30, 2006); James Thomas Jefferson v. State, No. M2003-01422-CCA-R3-PC, 2005 WL 366891, at *4 (Tenn. Crim. App. at Nashville, Feb. 16, 2005).

Regardless, the appellant argues that "Ferguson as decided is far too narrow." He contends that

> trial counsel knew that no fingerprint evidence was taken, which is no different from the [petitioner's] perspective than the State having taken it, not viewing it, and then losing it, as occurred with the videotape in Ferguson. As such, the Ferguson test should be modified so that any act of negligence perpetrated by the State which *may* have destroyed evidence favorable to the defense necessitates a corrective jury instruction.

Correlatively, the petitioner argues that trial counsel's failure to request a curative instruction constituted ineffective assistance of counsel.

The post-conviction court found that Ferguson was not applicable because the evidence complained of did not exist. The court also found that "[s]ince no fingerprint[s] were ever lifted, there was no basis for a curative jury instruction per Ferguson. Petitioner has failed to demonstrate by clear and convincing evidence that his counsel [were] ineffective for failing to seek non-existent fingerprint evidence or for failing to request curative instruction." We agree. Thus, the petitioner's Ferguson arguments are unavailing.

We note that from our review of his brief, it appears that the petitioner seeks to require the State to conform its investigation to a defendant's demands. However, "[d]ue process does not require the police to conduct a particular type of investigation. Rather, the reliability of the evidence gathered by the police is tested in the crucible of a trial at which the defendant receives due process." State v. Terry W. Smith, No. 01C01-9609-CC-00404, 1998 WL 918607, at *14 (Tenn. Crim. App. at Nashville, Dec. 31, 1998). This court has previously stated that "[i]t is not the duty of this Court to pass judgment regarding the investigative techniques used by law enforcement unless they violate specific statutory or constitutional mandates." State v. Robert Earl Johnson, No. M2000-01647-CCA-R3-CD, 2001 WL 1180524, at *17 (Tenn. Crim. App. at Nashville, Oct. 8, 2001). The petitioner has not proven ineffective assistance relating to this issue.

As his next issue, the petitioner maintains that "the trial court erred in not finding that [the petitioner's] trial counsel was ineffective and prejudiced [the petitioner] when he failed to introduce evidence that petitioner was driving a different stolen car when stopped." On appeal, this court may not second-guess the tactical or strategic choices of counsel unless those choices are based upon inadequate preparation, nor may we measure counsels' behavior by "20-20 hindsight." See State v.

Hellard, 629 S.W.2d 4, 9 (Tenn. 1982). Moreover, "[a]llegations of ineffective assistance of counsel relating to matters of trial strategy or tactics do not provide a basis for post-conviction relief." Taylor v. State, 814 S.W.2d 374, 378 (Tenn. Crim. App. 1991). Lead counsel clearly testified that as a matter of strategy, the defense did not inform the jury that the Oldsmobile which the petitioner was driving at the time he was stopped had also been stolen. Lead counsel explained that he believed the jury would not look favorably upon the petitioner after learning his connection to not one but two stolen vehicles. We will not second-guess this decision. Moreover, we note that our review of the trial transcript reveals that the attorneys adduced proof at trial establishing that the Oldsmobile did not belong to the appellant, which proof is the crux of the petitioner's complaint on appeal. This issue is without merit.

## III. Conclusion

Finding no error, we affirm the judgment of the post-conviction court.

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NORMA McGEE OGLE, JUDGE